Supreme Court, U.S.
FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

and

CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

CORRECTED COPY

GEORGE H. COHEN
JEREMIAH A. COLLINS
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5383

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	15

TABLE OF AUTHORITIES

Cases — Page

Bowles v. Seminole Rock Co., 325 U.S. 410 (1945) .. 2, 4, 5
Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974) 11
Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 4
Crandon v. United States, 110 S.Ct. 997 (1990) 4
Cuyahoga Valley R. Co. v. Transportation Union, 474 U.S. 3 (1985) 8, 13
Donovan v. A. Amorello & Sons, Inc., 761 F.2d 61 (1st Cir. 1985) 11, 14
Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 12
Immigration Service v. Stanisic, 395 U.S. 62 (1969) 4
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 3
Mullins Coal Co. v. Director, OWCP, 484 U.S. 135 (1987) 5
NLRB v. Food and Commercial Workers, 484 U.S. 112 (1987) 3
Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268 (1980) 4
Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835 (1989) 5
United States v. Larionoff, 431 U.S. 864 (1977) 5

Statutes and Regulations

Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ..... *passim*
Section 2(b)(3), 29 U.S.C. § 651(b)(3) 6, 7
Section 6, 29 U.S.C. § 655 7
Section 6(b), 29 U.S.C. § 655(b) 13
Section 6(b)(6), 29 U.S.C. § 655(b)(6) 7
Section 6(d), 29 U.S.C. § 655(d) 7
Section 8, 29 U.S.C. § 657 7
Section 10(a), 29 U.S.C. § 659(a) 7
Section 10(c), 29 U.S.C. § 659(c) 7, 8
Section 11(b), 29 U.S.C. § 660(b) 7
Section 12(a), 29 U.S.C. § 661(a) 12

TABLE OF AUTHORITIES—Continued

29 C.F.R.: — Page
Section 1910.134 6
Section 1910.134(e)(5) 6
Section 1910.1029(g)(3) 6

Miscellaneous

H.R. Rep. No. 1291, 91st Cong., 2d Sess. (1971) 8
S. Rep. No. 1282, 91st Cong., 2d Sess. (1970) 8, 9
Senate Committee on Labor and Public Welfare, Subcommittee on Labor, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (Comm. Print 1971) 8, 9, 10, 11, 14
Current Report, 18 O.S.H. Rep. 1668 (BNA) (Mar. 1, 1989) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1541

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

and

CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 14 million working men and women, most of whom are covered by the Occupa-

tional Safety and Health Act and are therefore affected by the issue presented in this case.

SUMMARY OF ARGUMENT

It is agreed that the Occupational Safety and Health Act grants the Secretary of Labor the authority to issue a Coke Oven Emissions Standard and the authority to include in that Standard a requirement of atmospheric testing of respirator fit. The only question is whether the Secretary in issuing her Standard has in fact promulgated such a requirement.

The settled law in such cases is that a rulemaker's construction of her own rule is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). Because the Court of Appeals determined that it is "certainly possible" to interpret the Coke Oven Emissions Standard as the Secretary has interpreted the Standard, Pet. App. 11a, the principle just stated requires that the Secretary's construction be accepted.

The role of the Occupational Safety and Health Review Commission under the OSH Act provides no basis for granting the Commission the authority to reject the Secretary's construction of a standard in favor of the Commission's construction. The language of the statute and the legislative history both establish that the Review Commission's role is essentially that of a factfinder. The principle that an adjudicative body should defer to a rulemaker's construction of her own rule is therefore fully applicable in defining the Review Commission's role *vis-à-vis* that of the Secretary.

Indeed, the considered refusal of Congress to grant the Review Commission, or any body outside the Labor Department, any role in OSH Act standard-setting gives this principle added force in the present context. Even putting aside the obvious point that the Secretary is in

a better position than the Commission to determine the meaning of the Secretary's own standards, it is far more consistent with the OSH Act's division of authority to allow the Secretary to determine the precise requirements of a standard when the terms of the standard are ambiguous than to assign that role to the Review Commission.

ARGUMENT

A. The dispute in this case is whether the Coke Oven Emissions Standard promulgated by the Secretary of Labor requires employers to engage in atmospheric testing to assure that the respirator worn by an employee exposed to coke oven emissions fits properly, so that carcinogenic fumes do not enter the employee's respiratory system. Pet. App. 2a, 10a, 79a.[1] The Secretary of Labor, who promulgated the Standard, takes the position that the Standard does require employers to assure proper fit through atmospheric testing. The Occupational Safety and Health Review Commission disagrees.

If the answer to the question whether the Coke Oven Emissions Standard requires employers to assure proper respirator fit through atmospheric testing turned on construing the terms of the Occupational Safety and Health Act (OSH Act), it would be a matter of some difficulty to determine what degree of deference, if any, might be owed to the respective views of the Secretary and the Review Commission on such a question.[2]

---

[1] "Atmospheric testing" consists of having the employee wear the respirator in a room filled with noxious vapors. If the employee can detect the odor, this shows that the respirator does not fit properly and is not providing adequate protection. Pet. App. 3a, 79a.

[2] "On a pure question of statutory construction, [the] first job [of a court] is to try to determine congressional intent, using 'traditional tools of statutory construction.'" *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987), quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987). On such a question there is no occasion for deference to an administrative inter-

But that is *not* this case. Respondents do not contend that anything in the OSH Act would have prevented the Secretary from requiring atmospheric testing of respirator fit in the Coke Oven Emissions Standard; respondents' submission is solely that the Secretary did not in fact promulgate such a requirement. In other words, the only question for decision is whether the Secretary actually promulgated the atmospheric testing requirement she claims to have promulgated.

This Court some time ago formulated the standard that governs where, as here, the question to be decided is one of a rulemaker's intent in promulgating a rule: in such a case "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). *See also Immigration Service v. Stanisic*, 395 U.S. 62, 72 (1969) (rulemaker's interpretation of a rule is "dispositive" unless it is "plainly" contrary to the language of the rule); *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977) (same).

As the Court put it in *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1850 (1989): "This interpretation of the agency's own regulation is not 'plainly erroneous or inconsistent with the regulation,' and is therefore controlling" (quoting *Bowles v. Seminole Rock Co., supra*).[3]

B. Here, the Court of Appeals did *not* conclude that the Secretary's interpretation of the Coke Oven Emissions Standard was plainly at odds with the language of the Standard. To the contrary, that court stated that it is "certainly possible" to interpret the Standard as the Secretary does. Pet. App. 11a. As we develop in the margin,

---

pretation unless Congress has left a "gap" for an agency to fill, *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984); that is to say, unless there has been a "legislative delegation to an agency [to resolve] a particular question," *id.* at 844.

The question whether the *Secretary* has been granted such interpretive authority as to particular matters under the OSH Act is *not* presented here, and we express no view on that question.

Nor does this case present the question of the *Review Commission's* role in deciding questions of statutory construction. However, for the reasons discussed *infra* pp. 6-12, we think it clear that the Commission has not been granted "the sort of specific responsibility for administering the law that triggers *Chevron*," *Crandon v. United States*, 110 S.Ct. 997, 1011 (1990) (Scalia, J., concurring in the judgment), and that the Commission's views on questions of statutory construction would therefore *not* be entitled to any particular deference. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (where an adjudicative board "is not a policymaking agency[,] its interpretation of the [statute] . . . is not entitled to any special deference from the courts").

[3] Somewhat different considerations may come into play if a rule, although not turning on a pure question of statutory construction, *see supra* p. 3, n.2, represents an attempt to effectuate what the agency discerns as the intent of the Legislature on a particular point. Such a situation was presented, for example, in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987), which turned on the quantum of evidence needed to establish an "interim presumption" of eligibility for black lung disability benefits under regulations issued by the Secretary of Labor.

On the one hand, there was, as the *Mullins Coal* Court observed, "no need to parse statutory language to decide th[at] case," 484 U.S. at 140, because there was no claim that the regulations as interpreted by the Secretary violated the governing statute, *id.* at 139. On the other hand, it was argued that "the Secretary's reading is not faithful to the purposes of the [statutory] program as reflected in its legislative history," *id.* at 140, because that history evinced a "clear congressional mandate for interim presumptions to reduce the number of benefit denials by both the [Social Security Administration] and Labor," *id.* at 152. Thus, *Mullins Coal*, while not involving the "pars[ing of] statutory language," required a detailed analysis of the statutory scheme and the intent of Congress with respect to the matter in dispute. *See id.* at 152-59. In that context the Court did not treat the view of the rulemaking agency as *dispositive*, but the Court stated nonetheless that "'[t]he agency's interpretation . . . is deserving of substantial deference 'unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 159, *quoting Bowles v. Seminole Rock Co., supra.*

the Court of Appeals showed a talent for understatement; on its face the Standard fairly read means what the Secretary says the Standard was intended to mean.[4]

The Court of Appeals nonetheless "defer[red] to the interpretation chosen by the Commission." *Id.* This was clear error. As we now show, nothing in the nature of the Review Commission or in the statute that creates the Commission provides a basis for departing from the general principle that the interpretation of a rule articulated by the *rulemaker* is to be accorded decisive weight.

1. The Review Commission was created, as the statute declares, "for carrying out adjudicatory functions under the Act." OSH Act § 2(b)(3), 29 U.S.C. § 651(b)(3).

---

[4] The Coke Oven Emissions Standard at 29 C.F.R. § 1910.1029(g)(3) incorporates the requirements for respirator programs set forth in 29 C.F.R. § 1910.134. The latter section provides in part that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly . . ., and, finally, to wear it in a test atmosphere." 29 C.F.R. § 1910.134(e)(5).

The Administrative Law Judge who heard this case concluded that this language can easily be read to impose the requirements urged by the Secretary. *See* Pet. App. 79a. Two members of the Review Commission disagreed, holding that § 1910.1029(g)(3) is "a training standard; it does not require the employer to assure proper fit of an employee's respirator." Pet. App. 40a. Those two Commissioners concluded that the references to "hav[ing the respirator] fitted properly" and to wearing the respirator "in a test atmosphere" apply only "during training." Pet. App. 41a. The third Commissioner dissented, holding that even if the provisions in question are viewed as a "training standard," those provisions were violated, because "[t]he purpose of paragraph 1910.134(e)(5) is to ascertain whether the respirator provides protection (have it fitted properly), and to prepare employees to work and function in a toxic environment." Pet. App. 51a, 53a.

The Court of Appeals accepted the interpretation adopted by the 2-1 Commission majority. The court below held that "[w]hile it is certainly possible to reach an alternate interpretation of the ambiguous regulatory langauge . . ., we defer to the interpretation chosen by the Commission," because "it cannot be said that the Commission's interpretation of § 1910.1029(g)(3) in this case was unreasonable." Pet. App. 10a, 11a.

The Secretary, not the Commission, has the exclusive authority to promulgate occupational safety and health standards, *see* OSH Act § 6, 29 U.S.C. § 655, and to grant variances from such standards, *see* OSH Act §§ 6(b)(6), (d), 29 U.S.C. § 655(b)(6), (d). The Secretary is also assigned the prosecutorial role under the Act: the Secretary conducts workplace inspections, *see* OSH Act § 8, 29 U.S.C. § 657, and issues citations and proposed penalties for alleged violations discovered in an inspection, *see* OSH Act § 10(a), 29 U.S.C. § 659(a).

If a citation is not contested—and more than 98% of the Secretary's citations are *not* contested[5]—the Review Commission does not become involved in the merits of the Secretary's enforcement action. In the small minority of cases where an employer *does* contest the citation or proposed penalty, or where an employee or employees' representative contests the length of time for abatement specified in the citation, "the Commission shall afford an opportunity for a hearing . . . [and] shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief . . ." OSH Act § 10(c), 29 U.S.C. § 659(c). If the citation is affirmed, only the Secretary may seek enforcement of the administrative order in a court of appeals. OSH Act § 11(b), 29 U.S.C. § 660(b).

It could not be clearer that the Review Commission's role is confined to "adjudicatory functions," as § 2(b)(3) declares. Certainly nothing in the OSH Act grants the Review Commission any powers beyond those normally possessed by an adjudicative body created to hear enforcement proceedings brought by a public prosecutor.

Indeed, the statute suggests that the Commission's function is even *narrower* than the role customarily

---

[5] See Current Report, 18 O.S.H. Rep. 1668 (BNA) (Mar. 1, 1989).

played by such an adjudicative body. For § 10(c), quoted above, states only that the Commission shall make "findings of fact," and does not mention any role for the Commission in interpreting the law or the Secretary's standards.

2. The legislative history confirms that the Review Commission's role in this regard is, at most, like that of a court. That history teaches that the Commission was created for a limited purpose, *viz.*, "to avoid giving the Secretary both prosecutorial and *adjudicative* powers," *Cuyahoga Valley R. Co. v. Transportation Union*, 474 U.S. 3, 7 (1985) (emphasis added).

a) At the outset of the OSH Act's development, the bills reported out of both the Senate and House Committees would have given the Secretary three distinct health and safety powers: standard-setting, prosecution of violations of the Act and of the standards promulgated thereunder, and administrative adjudication of the merits of citations alleging such violations. *See* S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15 (1970), *reprinted in* Senate Committee on Labor and Public Welfare, Subcommittee on Labor, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health of 1970* (Comm. Print 1971) ("Leg. Hist.") 148, 155; H.R. Rep. No. 1291, 91st Cong., 2d Sess. 18-19, 24 (1970), *reprinted in Leg. Hist.* 348-49, 854.

The Administration, on the other hand, favored "separat[ing these powers] by giving the quasi-legislative power to promulgate standards to a five-man board and the quasi-judicial power of adjudication to an independent three-man Panel," leaving the Secretary with only the prosecutorial function of issuing and prosecuting citations of alleged violations of the Act and of standards issued by the independent board. S. Rep. No. 1282 at 54, *reprinted in Leg. Hist.* 193 (Individual Views of Senator Javits).

Senator Javits, the ranking minority member of the Senate Labor Committee, in turn, had suggested a compromise that would have given the Secretary the standard-setting and prosecutorial authorities while conferring the authority to "adjudicate enforcement cases" on an independent panel. S. Rep. No. 1282 at 55, *reprinted in Leg. Hist.* 194 (Individual Views of Senator Javits). *See also* S. Rep. No. 1282 at 15, *reprinted in Leg. Hist.* 155 (discussing Committee's rejection of an independent board for "adjudicative functions").

On the Senate floor, Senator Javits succeeded in gaining adoption of his compromise as an amendment to the Committee bill. *See Leg. Hist.* 478-79. His supporting argument was that it would not be fair for the Secretary to act as both "prosecutor and judge" in enforcement cases, because this would put the Secretary in a position where "[a]ny finding by the Secretary in favor of a respondent would be essentially a repudiation by the Secretary of his own Department's employees." *Leg. Hist.* 392. *See also* S. Rep. No. 1282 at 56, *reprinted in Leg. Hist.* 195.

Other supporters of an independent adjudicative body sounded the same theme. *See Leg. Hist.* 298 (Senator Saxbe) (under the Committee bill, the Secretary would act not only as prosecutor but as "judge and jury" as well); *Leg. Hist.* 440 (Senator Dominick) (Committee approach would make it difficult for a Labor Department official "to determine whether he was at any given time filling the role of judge, prosecutor, or inspector"); S. Rep. No. 1282 at 63, *reprinted in Leg. Hist.* 202 (Minority Views of Senators Dominick and Smith) (independent adjudicative body was needed to "obviate the inevitable conflict which arises when the Secretary must review his own actions as carried out by the various subordinate levels of the Department").

In the House, a bill that had been introduced by Representatives Steiger and Sikes as a substitute to the Committee bill was passed. The Steiger-Sikes bill, like the

Javits compromise, provided for an independent adjudicatory panel. *Leg. Hist.* 1092, 1098-99. This provision met with favor even from those members of the House who supported the Committee bill. Thus Representative Perkins—the Committee chairman—stated that if the Steiger-Sikes substitute were defeated, the Committee bill would be amended to conform to the language adopted by the Senate under which "contested citations will be considered by an independent court, so to speak, an independent review commission." *Leg. Hist.* 1074.[6]

The arguments of the House proponents of this approach were the same as in the Senate. *See Leg. Hist.* 1015 (Representative Eshleman) (in the Committee bill "the Secretary of Labor is a combination rulesmaker, policeman, judge and jury"); *Leg. Hist.* 980 (Representative Smith) ("[t]he substitute bill provides for a tribunal other than the Secretary to act as judge and jury").

The proponents of the Javits compromise emphasized, too, that although adjudication would be placed in the hands of an independent commission, "standards . . . are left in the hands of the Secretary of Labor." *Leg. Hist.* 392 (Senator Javits). *See also Leg. Hist.* 1074 (Representative Perkins). Senator Javits explained that he was content to leave the Secretary full standard-setting authority as well as prosecutorial authority because "[t]he enforcement of orders is an adjudicatory act, whereas the establishment of standards is a deliberative act." *Leg. Hist.* 464.

Thus, standard-setting was left to the Secretary, while adjudication of enforcement cases, which Congress viewed as "a case by case proposition," was made the

[6] In contrast to the Javits compromise adopted in the Senate, the Steiger-Sikes substitute also provided for an independent board to set health and safety standards. *Leg. Hist.* 1094-96. This provision was highly controversial, *see, e.g., Leg. Hist.* 1074-75 (Representative Perkins), and the approach of the Javits compromise prevailed in conference, *Leg. Hist.* 1146, 1186.

province of the Review Commission, because such an adjudication "does not apply across the board to every member of industry" but involves the facts pertaining to "[o]ne particular . . . company." *Id.* (Senator Javits).

b) In a thoughtful opinion, Judge Breyer has summarized the lessons of the legislative history just discussed:

> This history suggests that OSHRC's mission is primarily factual in nature; its role is to hear charges of violations, *see* [*Leg. Hist.*] at 472 (remarks of Sen. Dominick, noting that purpose of OSHRC is to "decide whether the rules . . . have in fact been violated"); and it seeks to guarantee that those charges are adjudicated fairly—in particular, without the bias that can arise from placing prosecutorial and adjudicative functions within a single agency. *See, e.g., Elman, Administrative Reform of the Federal Trade Commission*, 59 Geo. L.J. 777, 810 (1971). The power to adjudicate inevitably encompasses, to some degree, the power to "declare" the law. *See Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-62 (4th Cir. 1974). But Congress must have foreseen that any such OSHRC power would be limited. After all, Congress specifically rejected a plan to place rulemaking powers in a body independent of OSHA. And, this fact suggests that Congress did not intend OSHRC to possess broad powers to set policy through the creation of rules—powers that other agencies sometimes exercise in adjudicatory (as well as rulemaking) proceedings. *See generally* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965) (describing National Labor Relations Board's use of adjudicatory proceedings for rulemaking purposes). This history suggests to us that, in cases of a conflict between an OSHRC interpretation of OSHA rules and OSHA's interpretation, Congress intended OSHA to be the more authoritative source. [*Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 65-66 (1st Cir. 1985)].

We submit that, if anything, Judge Breyer is too tentative. For present purposes the critical point is that the legislative history establishes that the Review Commission's role *vis-à-vis* the Secretary is like that of a court. The consistent refrain was that the Commission's role is "adjudicative," that of "judge and jury," "an independent court, so to speak." *See supra* pp. 8-10.[7] Thus, the principle recognized in this Court's decisions cited *supra* pp. 4-5—*viz.*, that a court should not substitute its judgment as to the meaning of a rule for that of the rulemaker—is fully applicable in defining the role of the Commission *vis-à-vis* that of the Secretary.[8]

Indeed, Congress' considered decision to assign standard-setting to the Secretary rather than to an independent body makes that principle particularly binding. *See supra* pp. 8-11. Congress' clear choice was that "[i]t is the Secretary, not the Commission, who sets the substantive standards for the workplace." *Cuyahoga Valley R. Co. v. Transportation Union*, *supra*, 474 U.S. at 6-7. Given that choice the determination whether the Coke Oven Emissions Standard fairly read does or does not require atmospheric testing of respirator fit is a determination to be made by the Secretary, not the Review Commission.

[7] The requirement that members of the Commission be selected "from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act," OSH Act § 12(a), 29 U.S.C. § 661(a), does not suggest that the Commission's role is broader than that of a court. Given the technical nature of the matters the Commission must address in its factfinding, it is desirable that a Commissioner possess special expertise. But this is not inconsistent with the view that the Commission's role is no broader than that of a court; for the desirability of special expertise has been noted even as to certain Article III courts. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 560 (1962) (opinion of Harlan, J.) ("In certain areas of federal judicial business there has been a felt need to obtain . . . the special competence in complex, technical and important matters that comes from a narrowly focused inquiry").

[8] The Court of Appeals therefore missed the point in stating that "an adjudicative function necessarily encompasses the power to 'declare' the law." Pet. App. 7a. Unlike the situation where statutory construction is at issue, *see supra* p. 3, n.2, the power of an adjudicative body to "declare the law" has never been understood to involve a general right to declare that a regulation means something other than what the author of the regulation says it means. *See supra* pp. 4-5.

3. There is no reason to depart in this case from the presumption that it is the rulemaker, not an adjudicative tribunal, that best understands the meaning of a particular rule. To be sure, if the Secretary arbitrarily were construing the Coke Oven Emissions Standard one way for some companies and another way for others, the concerns that led Congress to create the Review Commission might arguably be implicated. *See supra* pp. 10-11. But that is *not* this case. The Secretary has adopted an across-the-board interpretation that the Coke Oven Emissions Standard requires atmospheric testing of respirator fit.

So too, we may grant that the Secretary's authority to promulgate standards does not empower her to modify a standard without resorting to the required rulemaking proceedings. *See* OSH Act § 6(b), 29 U.S.C. § 655(b).[9] But, again, that is *not* this case. As the Court of Appeals acknowledged, the Standard can fairly be construed to require atmospheric testing of respirator fit, *see supra* p. 5, and there is accordingly no more reason (in fact, there is *less* reason) to view the Secretary's construction of the Standard as an impermissible modification than there is to view the *Review Commission's* construction as an impermissible modification.

Indeed, it should go without saying that the Secretary, who promulgated the Standard, is in a better position than the Commission to know the "true" meaning of the

[9] This consideration explains why an administrative construction of a regulation cannot prevail if the language of the regulation is *plainly* to the contrary. *See supra* pp. 4-5.

Standard's provisions.[10] But even if one were to discount the reliability of the Secretary's "institutional memory," *Donovan v. A. Amorello & Sons, supra*, 761 F.2d at 66, the fundamental point would remain: where a standard is ambiguous and must therefore be given content in some particular respect, the legislative judgments embodied in the OSH Act dictate that it is far more appropriate that the requirements of the standard be determined by the Secretary, who was chosen by Congress to set the standards in the first place, than by the Review Commission, whose role is essentially limited by Congress to that of factfinding. The Court of Appeals' decision to the contrary is inconsistent both with the general principles that govern interpretation of regulations and with the division of authority between the Secretary and the Commission that is central to this specific statutory scheme.

---

[10] As Judge Breyer has put it:

> [P]ractical administrative considerations favor looking to OSHA for a more authoritative interpretation of the regulation. Since OSHA employees chose the language of the regulation, OSHA is more likely to have an institutional memory of the regulation's purposes and meaning. . . . Moreover, OSHA's experience as both a "legislating" and "enforcing" agency provides it with expert knowledge of the likely practical outcomes of different interpretations. OSHRC, too, has acquired some expertise in this area from its experience in adjudicating disputes over OSHA regulations, *cf. Legislative History, supra*, at 429 (remarks of Sen. Williams), and this expertise entitles its views to special consideration in appropriate cases. But, that expertise arises out of its having adjudicated many cases; it is likely factual in nature; and it necessarily concerns examples of rule violations (which are presumably less typical than instances of compliance).
>
> In sum, practical considerations of expertise as well as legislative history of Congressional intent suggest that OSHA speaks with greater authority when the interpretation of OSHA's substantive rules is at issue. [*Donovan v. A. Amorello & Sons, supra*, 761 F.2d at 66 (citation omitted)].

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

GEORGE H. COHEN
JEREMIAH A. COLLINS
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5383